IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

C.R. No. 2965 of 2004 (O & M)
Reserved on:- 04.02.2015
Date of decision: 10.04.2015

Vinod Kumar and others ...Petitioner(s)

Versus

Darbara Singh (D) through L.Rs. and others ...Respondent(s)

CORAM: HON'BLE MR. JUSTICE G.S.SANDHAWALIA

Present: Mr. Animesh Sharma, Advocate,
for the petitioners.

Mr. J.S. Toor, Advocate,
for the respondents.

G.S.SANDHAWALIA, J.

Challenge in the present revision petition filed under Article 227 read with Section 115 of the Constitution of India is for setting aside the various ex parte orders passed by the Executing Court against the petitioners including the order dated 14.12.1994 (Annexure P-1) passed under the proceedings of Order 21 Rule 66 CPC. The auction proceedings conducted on 24.02.1995/02.03.1995 (Annexure P-2) and the orders confirming the sale on 19.08.1995 (Annexure P-3) alongwith the issuance of the sale certificate dated 30.09.1995 by the Additional Senior Sub Judge, Samana alongwith the order dated 23.03.2004 (Annexure P-5) whereby, the application under Section 151 CPC for setting aside of the ex parte proceedings was dismissed are also subject matter of challenge.

The suit for specific performance was filed by respondent no. 2-deceased Piara Singh, who was the tenant in the land, for performance of the contract of sale dated 25.12.1976 regarding 126 kanals 5 marlas against one Nanak Chand Khosla, Vinod Kumar, sons of Late Lala Bisheshar Parshad and Kaushalaya Devi, who was the widow of Lala Bisheshar Parshad. Petitioner no. 1 is son of Lala Bisheshar Parshad whereas petitioners no. 2 and 3 are daughters of Lala Bisheshar Parshad. The suit was decreed on 26.10.1982 only to the extent of refund of the earnest money of ₹25,000/- by Sub Judge, Ist Class (Patiala). An appeal was filed and cross objections by the defendants against the judgment and decree was also dismissed on 02.06.1983 by the Additional District Judge, Patiala. Initially, execution application was filed in the year 1988 at Patiala, which was transferred to the Court at Samana in the year 1989 and was dismissed in default on 22.12.1990. In the meantime, Kaushalya Devi, mother of the present petitioners expired on 02.08.1991.

A second execution application was filed bearing No. 129 on 19.10.1991 without bringing the other legal representatives on record, in which notice was issued to the judgment debtors for 14.12.1991. Service was not effected upon them and on 09.06.1993, warrants of attachment were issued for 25.08.1993. Vide order dated 13.10.1993, the Executing Court noticed that attachment had been effected and issued notice under Order 21 Rule 66 CPC for 08.12.1993. Thereafter, on 20.08.1994, the Court being satisfied that the service could not be effected except through substituted mode, directed that service be effected upon the judgment debtors through *munadi* and affixation on deposit of *munadi* charges. On a subsequent date on 15.10.1994, it was noticed that the service had to be effected outside Samana Sub Division and, therefore, service was ordered to be effected through publication in Daily Ranjit newspaper, Patiala for 14.12.1994.

Resultantly, ex parte proceedings were initiated on 14.12.1994 on account of non putting in appearance on behalf of the judgment debtors. The sale was fixed for 24.02.1995.

On the said date, the auction proceedings were conducted by Kanungo and Patwari in which 81 kanals and 1 marla of land were put to auction. Three persons namely Darbara Singh-respondent no. 1, Balwinder Singh and Gian Singh took part, which started from sum of ₹27,800/- and was finalized at ₹30,000/- in favour of respondent no. 1 who was none other than the brother of the decree holder-respondent no. 2, Piara Singh. A sum of ₹7,500/- was deposited by him and he was directed to deposit the balance amount of ₹22,500/- within 15 days. The said auction proceedings were forwarded to the Court of Additional Senior Sub Judge by the Tehsildar alongwith the amount. The sale was confirmed on 19.08.1995 keeping in view the deposit of the balance amount on 09.03.1995 since the decree holder made a statement that he has no objection if the sale was confirmed. The Court noticed that no application had been filed for setting aside the auction sale since no objections had been received, though it also noticed that a large chunk of land had been sold for a small amount. It was also noticed that the auction purchaser was one of the tenants who was in possession of the land for a long time. The certificate dated 30.09.1995 (Annexure P-4) under Order 21 Rule 94 CPC for sale of land was resultantly issued.

The petitioners thereafter filed an application under Section 151 CPC for setting aside the ex parte proceedings in the said execution on 19.04.1996. The ground taken in the application was that Kaushalya Devi had died leaving behind a registered Will in favour of her two daughters petitioners no. 2 and 3 and petitioner no. 1 had gone to the village in April 1996 when he came to know about the sale which had taken place. He had applied for the mutation which had been sanctioned on 19.01.1996 and thereafter he had filed the application alleging that a fraud had been practised upon the Court as well as the applicants since no notice had been given to them as required under law. It was averred that the applicants were residents of Mohalla Naudan Misser, Near Darshani Gate, Patiala but no summons were received on the said address and the decree holder was well aware of the address. It was mentioned that the decree holder was a tenant in the land alongwith his sons and brothers and even the auction purchaser was his real brother and also a tenant. The allegation was that a meager amount of ₹30,000/- had been paid for land measuring 81 kanals 1 marlas (over 10 acres), the value of which was not less than 20 to 25 lacs whereas the decretal amount was ₹25,000/- only + costs of ₹2,700/-. Had any notice been given to the applicants, they would have paid the amount of costs and were still willing to do so. The property had thus been grabbed with collusion and fraud and substantial loss had been caused. The sale of land in excess of the decretal amount was illegal and the Court had not applied its mind as to what extent the amount of land should be sold. Violation of Order 21 Rule 54 (1A) CPC was alleged since no date had been fixed for settling the terms of proclamation of sale and no proclamation of attachment was made under Order 21 Rule 54 CPC which was mandatory. Kaushalya Devi having died on 02.08.1991 the execution proceedings having been issued against a dead person, the same were null and void and without any authority and no proper publication had been made.

The defence taken by Darbara Singh, the decree holder, was that the application was time barred and the applicants-petitioners had due knowledge as the execution petition had been instituted at Patiala and they had been represented by counsel and, thereafter, it had been transferred to Samana in April, 1989. Accordingly, it was pleaded that the judgment debtors had knowledge of the decision of the case and they had been appearing in execution proceedings and the sale certificate had been issued to Darbara Singh. Mutation had been sanctioned in his favour and there was nothing illegal in the sale which was done after due notice as required under law. It was the duty of the legal representatives to file an appropriate application and proceedings never abated on the death of the judgment debtor in view of the Punjab amendment of 1975.

The decree holder in his reply submitted that the applicants had knowledge about the pendency of the litigation and they had not mentioned about any source from where they came to know about the facts. They were well aware and summons had been issued to them and thereafter publication was got effected in the Daily Ranjit newspaper. They had intentionally not appeared before the Court and made any payment and that the ex parte order dated 14.12.1994 was justified. The land was sold in open auction and it was denied that the price was less. The decree holders not having known the factum of death of Kaushalya Devi and resultantly, the procedure followed was sought to be justified.

The applicants in their replication took the plea that once fresh execution had been filed, they had no notice of the same. In the meantime, Kaushalya Devi had expired since they had never appeared in the second execution application they had no notice of the same. On the basis of the pleadings, the trial Court framed the following issues:-

> *"1. Whether the exparte proceedings in execution No. 129 dated 19-10-1991, sale proceedings and the sale certificate dated 20-9-95 is liable to set aside? OPA*
> *2. Whether the execution proceedings issued against the dead person are not maintainable?OPA.*
> *3. Whether the application is not maintainable in the present form?OPD-1.*
> *4. Relief."*

Vinod Kumar AW-1 appeared in support of his case whereas Darbara Singh, the auction purchaser had appeared as RW-1 whereas none appeared on behalf of the decree holder who was proceeded against ex parte. Respondent no. 6-Nanak Chand Khosla, who was a co-judgment debtor supported the case of the petitioner-applicants.

Issues no. 1 and 2 regarding the ex parte proceedings and whether the execution proceedings were maintainable against a dead person were held against the petitioners and in favour of the auction purchaser. Issue no. 3 regarding the maintainability of the application was decided in favour of respondent no. 1 by noticing that notice had been given to the petitioners but none had put in appearance and publication had been made in Daily Ranjit newspaper. The factum of the sale having been confirmed and the sale certificate having been issued and earlier counsel having appeared in the first execution application weighed with the Executing Court. The observations were made by placing reliance upon the judgment of the Apex Court in ***V. Uthirapathi vs. Ashrab Ali and others, (1998) 3 SCC 148*** to hold that it was for the judgment debtors to bring the legal representatives on record. The full amount of the purchase having been paid before the 15th day and no application having been filed for setting aside the auction sale weighed with the Court and it rejected the argument that the land had been sold at a throw away price. It was further held that provisions of Order 21 Rule 89 CPC were mandatory and for setting aside the sale, no amount had been deposited by the applicants and resultantly, the application was dismissed.

Mr. Animesh Sharma, counsel for the petitioner has thus submitted that fraud has been played and the Court did not take it into consideration the fact that the auction purchaser was none else but the brother of the tenant. Service had never been properly effected upon the petitioners and they had been wrongly proceeded against ex parte without any proper affixation having been made. Substituted service was wrongly ordered without any proper satisfaction and the petitioners were residents of Patiala and wrong address had been given in the execution petition which was different from the one which was given in the suit. It was accordingly submitted that once Kaushalya Devi has died, the second application without impleading legal representatives was not sustainable.

Counsel for the respondents, on the other hand, submitted that under Order 21 Rule 99 proviso, no fresh notice was required under the second execution application which was filed within two years of the dismissal of the first application. Petitioner no. 1 was the legal representative of Kaushalya Devi and he was already represented in the execution application in his own independent right and had never filed any application for impleading the legal representatives. The application filed under Section 151 CPC was not maintainable and was a vague application. The value of the property in the year 2001 was being taken into consideration when the statement of the witness was being recorded and, therefore, there was no material on record to show that the property sold was valued more. Therefore, no injury had been caused as such to the petitioners and justified the proceedings by submitting that they were well aware and chose not to contest.

As noticed above, the record would show that notice was issued on 19.10.1991 and service could not be effected upon the respondents in the execution application where admittedly, their address is shown as residents of Mohalla House Misser, Near Sarshani Gate, Patiala. The address mentioned in the suit for specific performance and in the Appellate Court would show that the applicants were residents of Mohalla Nauda Misser near Darshani Gate, Patiala. Thus, it is apparent that in the second execution petition, the wrong address had been given. The petitioners thus could never be served and after a period of 3 years from the filing of the petition on 19.10.1991, the Executing Court had directed that munadi and affixation be made vide order dated 20.08.1994. Thereafter, it had noticed that since the judgment debtors were residing outside the jurisdiction of the Samana Court and in Patiala directed publication through the Daily Ranjit newspaper. Thus, no affixation was made at the last known address under Order 5 Rule 17 CPC which provides that in case the defendant cannot be found, the serving officer will affix a copy of summons on the outer gate of some conspicuous part of the house in which the defendant ordinarily resides. Under Order 5 Rule 20 CPC also, the Court had to be satisfied that there was a reason to believe that the defendant was keeping out of the way for the purpose of avoiding service. The summons were also to be served by affixing a copy thereof in some conspicuous part of the court house and also upon the conspicuous part of the house on which the defendant was known to have last residing. It is only thereafter, publication was meant to be ordered under Order 5 Rule 20 (1)(a) CPC and the record does not show that such a process was resorted to. Reference can be made to the judgment of the Apex Court in ***Sushil Kumar Sabharwal vs. Gurpreet Singh and others, 2002 (2) PLR 382*** wherein, while dealing with the procedure under Order 5 Rules 17 and 18 CPC, the ex parte decrees were set aside. Reference can also be made to the judgment of this Court in ***Kuldip Rai vs. Sharan Singh and others, 1989 (1) PLR 536*** wherein, it has been held that the substituted service has to be only ordered after satisfaction of the Court and not in a routine manner. The relevant observations read thus:-

> *"7. Before ordering substituted service the court has to be satisfied that the conditions on which alone publication can be ordered exist, namely that the defendant is keeping out of the way to avoid service or that for any other reason service cannot be effected in the ordinary way. The interim orders reproduced supra do not indicate that there was any material before the Court on the basis of which it could record its satisfaction that the respondents were keeping out of the way to avoid service or that for any other reason service cannot be effected in the ordinary way. Before resorting to the provisions of Order 5 Rule 20 of the Civil Procedure Code (for short "the Code"), it is obligatory for the Court to record its satisfaction as enjoined under the statute. The substituted service cannot be ordered in the routine manner. The perusal of the interim orders does not justify issuance of order for substituted service. It indicates lack of applicability of judicial mind to the facts of the case. Moreover, it was obligatory for the respondent-landlord to prove that the newspaper through which substituted service was ordered was in daily circulation in the locality in which*

> *the petitioner was last known to have actually and voluntarily resided, carried on business or personally worked for gain. Once it is disputed that there was no valid service, it is for the respondent to establish that the petitioner was validly served and valid service presupposes service in accordance with the procedure prescribed by law. The landlord failed to establish the prerequisites enjoined by clause 1-A of Rule 20 of Order 5 of the Code. The following observations in S.V.P. Chockalingam Chettiar v. V.C. Rajarathnam and others (supra) can be usefully referred to :-*
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> > *"Rule 20 of Order 5, Civil Procedure Code provides for substituted service, the main purpose of it is to bring it to the notice of the person to whom it is intended. Substituted service cannot be regarded as an idle formality to be gone through. Unfortunately the learned Subordinate Judge appears to have thought that as substituted service had been ordered by the Court and effected, the question of the sufficiency of it will no longer arise. That, however, is not the correct way of the approaching the question. A valid substituted service of a notice should conform to the conditions prescribed in Order 5, Rule 20, Civil Procedure Code If it does not conform to that rule, service will have to be regarded as not in accordance with law and therefore not sufficient."*
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> *Accordingly, I hold that the petitioner-applicant was not validly served and the order directing that ex-parte proceedings be taken against him is bad in law."*

The summons were not even sent to the Court at Patiala to effect service under the provisions of Order 5 Rule 21 CPC as amended by this Court whereby, it is provided that the Court having jurisdiction would deliver the summons by its officers or one of his subordinates. Thus, it is apparent that the ex parte proceedings on 14.12.1994 were done without following the proper procedure and the petitioners were never aware of the proceedings which were being carried out at their back. It is also a matter of fact that the decree holder and the auction purchaser being closely related were well aware of the correct address of their landlords being their tenants and could have furnished the correct address.

The illegality in the procedure carried out does not stop at the initial stage itself. That under the provisions of Order 21 Rule 66(2)(a) CPC, the Court has to in the proclamation drawn up is to specify as to what part of the property would be sufficient to satisfy the decree. The proviso further provides that for settling the terms of proclamation under Rule 59, it would be necessary to give notice under the rule to the judgment debtor unless the Court otherwise directs. That under Order 21 Rule 64 CPC also, the Court executing the decree attached by it has to see how much portion would be necessary to satisfy the decree which can be sold. Reference can be made to the judgment of the Apex Court in ***Ambati Narasayya vs. M. Subba Rao, AIR 1990 SC 119,*** wherein, it has been held that such a procedure is mandatory. In the said case, similarly, 10 acres of land had been sold to satisfy the decree for a sum of ₹2,395.50/-. Reliance was placed upon the provisions of order 21 Rule 64 CPC to hold that if the property is large and the decree to be satisfied is small, only that portion of the property should be sold which would be sufficient to satisfy the claim of the decree holder in the execution petition. The sale thus held without examining this aspect was held to be illegal and without jurisdiction as the

Court had made no attempt and had blind foldedly sold the entire property. It was thus held that it is a duty cast upon the Court and the mandate of the Legislature could not be violated. The relevant observations read thus:-

> *"6. The principal question that has been highlighted before us relates to the legality of the sale of 10 acres of land without considering whether a portion of the land could have been sold to satisfy the decree. It is said that the total sum claimed in the execution was Rs.2,395.50. The relevant provision which has a bearing on the question is Rule 64 Order XXI of the Code of Civil Procedure and it reads as follows:*
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> > *"Order 21 Rule 64: Power to order property attached to be sold and proceeds to be paid to persons entitled--Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same."*
>
> *7. It is of importance to note from this provision that in all execution proceedings, the Court has to first decide whether it is necessary to bring the entire attached property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small, the Court must bring only such portion of the property, the proceeds of which would be sufficient to satisfy the claim of the decree holder. It is immaterial whether the property is one or several. Even if the property is one, if a separate portion could be sold without violating any*

provision of law only such portion of the property should be sold. This, in our opinion, is not just a discretion, but an obligation imposed on the Court. Care must be taken to put only such portion of the property to sale the consideration of which is sufficient to meet the claim in the execution petition. The sale held without examining this aspect and not in conformity with this re- quirement would be illegal and without jurisdiction.

8. xxx xxx xxx

9. We may again hark back to the case of the appellant. The amount claimed in the execution petition was about Rs.2,400. To realize that amount the land measuring 10 acres was sold for Rs. 17,000. The appellate court has stated that the land being one, could not have been divided. Shri Ganesh, learned counsel for the respondent sought to justify that view. But we find it difficult to appreciate that reason. It seems to be against common sense. The land is not indivisible. Nor division is impracticable or undesirable. Out of 10 acres, the Court could have conveniently demarcated a portion and sold it. Unfortunately, no such attempt was made and it was not even thought of. The Court has blind fold sold the entire property. This is a usual feature which we have noticed in most of the execution cases. We must deprecate this tendency. There is a duty cast upon the Court to sell only such property or a portion thereof as necessary to satisfy the decree. It is a mandate of the legislature which cannot be ignored. We cannot, therefore, sustain the im- pugned sale. It must be set aside being in contravention of the provisions of Rule 64, Order 21, CPC."

Under Rule 51(1A) CPC also, a specific order has to be passed directing the judgment debtor to attend the Court on a specified date for fixing and settling the terms of the proclamation of sale.

In the present case, as noticed, no such exercise was done and, therefore, a huge chunk of land measuring 81 kanals 1 marlas (approx. 10 acres) was sought to be sold for a paltry sum of ₹30,000/- where only 3 bidders participated and the amount of bid varied from ₹27,800/- which was the first bid and only went upto ₹30,000/- to satisfy the decretal amount of ₹27,700/-. The mandatory provisions of serving the petitioners for satisfying the decree was thus violated without giving them an opportunity to clear off the dues. The right of the judgment debtors to clear off the dues by giving him notice of the execution has been noticed by the Apex Court in ***Satyanarain Bajoria and another vs. Ramnarain Tibrewal and another, 1993 (4) SCC 414.*** In the said case, it was held that the Court was duty bound under Order 21 Rule 22 CPC to issue notice and to give an opportunity to the judgment debtor to clear off the dues and if there was any attachment, the same would be then vacated. In the said case also, the first application for execution had been dismissed and, thereafter, the second application was filed after 3 years and the property was bought by the decree holder himself and it was held that when fraud permeates the whole proceedings and the judgment debtor was kept in the dark and the decree holder tried to under value the property, there was an illegality and substantial injustice and loss to the judgment debtor. Resultantly, the order of the Executing Court which had set aside the auction sale was restored by holding that there were irregularities and fraud in conducting the sale. The relevant observations read thus:-

> *"14. It will be noticed that Sub-rule (1) of Rule 54 of Order 21 of the Code contemplates and order of*

prohibition to be served on the judgment-debtor from transferring or charging the property in any way first if the property sought to be sold is immovable property. This is for the benefit of the decree-holder. Even at this stage if the judgment-debtor had notice of attachment, he could pay the balance decretal amount and thereafter attachment would either not be effected and if already effected would be vacated. Sub-rule (1-A) contemplates that this order shall require the judgment-debtor to attend court on a specified date, to take notice of the date to be fixed for settling the terms of the proclamation of sale provided under Rule 66 of Order 21 of the Code. There was no evidence that the judgment-debtor was personally served with such a notice. Though sale proclamation after settlement of terms of proclamation after settlement of terms of proclamation ex-parte was published in local newspaper "Dalit Mitra" but that have wrong case number and wrong name of the court. There was also no evidence that any notice was affixed on a conspicuous part of the Court house or that the provisions of Sub-rules (1-A) & (2) of Rule 54 of Order 21 of the Code were complied with. Rule 54 is again for safeguarding the right of the decree-holder as well as the judgment-debtor. By the notice the judgment-debtor is put on notice that his property is attached and would be sold unless he pays off to the decree-holder. The trial court observed that this notice is required to be affixed on a conspicuous part of the property. We do not mean that merely if it is not being affixed on the conspicuous part, the sale would to be set aside but we are only emphasising the requirement of it being affixed on the conspicuous part of the property and on court house. All these stages give an opportunity to the judgment-

debtor to pay off dues, if any under the decree. The proclamation of sale in this case was thus settled without notice to the judgment-debtor. The judgment-debtor had the right to participate in the proceedings for settlement of terms of proclamation of sale and atleast to know the date of sale. This is necessary since Order 21 Rule 89 of the Code confers again a right on any person having interest in the property sold, file an application to set aside sale on making deposit as contemplated by Rule 89. Rule 89 of Order 21 of the CPC reads thus:

> *"89. Application to set aside sale on deposit - (1) Where immovable property has been sold in execution of a decree, any person claiming an interest in the property sold at the time of the sale or at the time of making the application, or acting for or in the interest of such person, may apply to have the sale set aside on his depositing in Court,-*
>
> *(a) for payment to the purchaser, a sum equal to five per cent of the purchase-money, and*
>
> *(b) payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree holder.*
>
> *(2) Where a person applies under Rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.*
>
> *(3) Nothing in this rule shall relieve the*

judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale

15. The lower appellate court after assuming that there was no proper service of notice under Order 21 Rule 54 of the CPC went on to the question of judgment-debtor's having not pleaded any substantial loss or injury. It will be noticed that it was a case of typical money lender who has evil-eye to grab the property of the judgment-debtor some how or the other. He allows the first application for execution to be dismissed; waits for practically three years to file another execution application claiming a sum of Rs. 350 only sees to it that judgment-debtor is kept ignorant of the proceedings in court; obtains permission to himself buy the property; gets the property sold for recovery of petty amount of Rs. 649.45 ps. and buys the property himself. This again is a typical illustration of fraudulent conduct of decree-holder. In such cases the court will even presume loss and substantial injury to the judgment debtor. In the present case there was evidence of value of the property and both the parties had led evidence in this behalf and it was too late for the lower appellate court to blame the executing court for recording evidence as to the valuation at that stage. The fraud permeates the whole proceedings. At no stage was the judgment-debtor made aware of the pending execution application till even the confirmation of sale and purchase of the property by the decree-holder himself.

16. It will be noticed that so far judgment-debtor was concerned, on calculation, he had practically deposited the entire decretal amount by 4th January, 1965 and there was some mistake in calculation for a petty amount of Rs. 350. No demand notice was even *sent to the judgment-debtor to pay it either outside the court or through the court. The judgment-debtor was deliberately being kept in the dark.*

17. Learned Counsel for the decree-holder submitted that these are questions of fact since the High Court dismissed the revision petition in limine this Court should not interfere with the questions of fact. If it was merely a case of questions of fact proved on record, learned Counsel for the decree-holder would have been right. It appears lower appellate court had no knowledge whatsoever of how even notice under Order 21 Rule 22 of the Code was required to be served or the evidence in relation thereto being led in proceedings for setting aside of the sale at the instance of the judgment-debtor. The lower appellate court could not read the order sheet or proceedings purporting to be under Order 21 Rule 22 of the Code while dealing with proceedings under Order 21 Rule 90 of the Code and hold that the notices have been served. Lower appellate court again was mixing up the service on judgment-debtor of notice under Order 21 Rule 54 of the Code and of proclamation of sale. The lower appellate court again was ignoring the importance of notice under Order 21 Rule 54 (1-A) and (2) to enable the judgment-debtor to have notice of proceedings for settlement of terms of proclamation under Order 21 rule of the Code. It is true that now it has been specifically clarified by the explanation to Rule 90 of Order 21 of the Code that "the mere absence of, or defect in, attachment of the property sold shall not, itself, be a ground for setting aside a sale under this rule". <u>But if the judgment-debtor is kept totally ignorant of the execution proceedings rights from the date of execution application till sale, it cannot be merely called a mere</u>

> *<u>irregularity in attachment and thus of no consequence</u>. Proceedings under Order 21 Rule 66 of the Code for settlement of terms of proclamation of sale are very material for both the parties, much more for the judgment-debtor as it is well known that the decree-holder always tries to under value the property whereas the judgment-debtor tries to over-value the property. However, provisions are made in the Code in Sub-rule (2) of Rule 66 of Order 21 that the sale proclamation shall be drawn up after notice to both the decree-holder as well as the judgment-debtor and shall state the time and place of sale and other requirements mentioned therein. No notice was given under Order 21 Rule 54 (1-A) of the Code which was mandatory for the court. In any case no notice for settlement of terms of proclamation of sale was served on the judgment-debtor personally as contemplated by Sub-rule (2) of Rule 66 of Order 21 of the Code."*

The proclamation notice which has been sent by the Executing Court to the Tehsildar, Samana dated 27.01.1995 also does not show any valuation of the land and how much of it would be sufficient to satisfy the decree. The sale of a huge chunk of property to satisfy a paltry amount of ₹30,000/- thus is apparently suffering from material illegality and irregularity. The Executing Court apparently has not followed the proper procedure specially keeping in view the fact that Kaushalya Devi had died on 02.08.1991 after the dismissal of the first execution application on 22.12.1990. The second application having been filed on 19.10.1991 was almost a year later and petitioners no. 2 and 3 being legal representatives had no occasion to come on record since no proceedings were pending on the date of the death of their mother and were gravely prejudiced by not being brought on record as the legal representatives and they neither had any opportunity as such to be aware of the execution proceedings. In such circumstances, they were well justified in approaching the Executing Court for setting aside of the orders and the Executing Court was remiss in dismissing the application for the reasons it recorded which cannot be held to be justified.

The judgment of the Apex Court in *V. Uthirapathi's case (supra)* which has been relied upon by the Trial Court pertains to the abatement of the execution petition and in such circumstances, the observations of the Apex Court are not applicable in the facts and circumstances of the present case.

Thus, this Court is of the opinion that the proceedings have been carried out by the Executing Court in a haste and it failed to appreciate the pleadings in its proper perspective which were filed under Section 151 CPC bringing to its notice the gross irregularities which had taken place in putting the property to sale at the back of the owners and by a interested party who was already in possession of the property in question and become owner of 10 acres of land for ₹30,000/-.

Resultantly, the present revision petition is accepted and the impugned orders dated 14.12.1994 (Annexure P-1), the auction proceedings conducted on 24.02.1995/02.03.1995 (Annexure P-2) and the orders confirming the sale on 19.08.1995 (Annexure P-3) alongwith the issuance of the sale certificate dated 30.09.1995 by the Additional Senior Sub Judge, Samana alongwith the order dated 23.03.2004 (Annexure P-5) are quashed and resultantly, the sale in favour of the deceased-respondent no. 1 is set aside. The parties shall put in appearance before the Executing Court at

Samana on 18.05.2015 for further proceedings.

10.04.2015 (G.S. SANDHAWALIA)
shivani JUDGE